



1201 Franklin Street, 13th Floor
Houston, Texas 77002
713.368.0016
713.437.4322 Fax

FILED
COURT OF CRIMINAL APPEALS
11/8/2017
DEANA WILLIAMSON, CLERK

Thursday, November 2, 2017

Presiding Judge Sharon Keller
Judge Michael Keasler
Judge Barbara Hervey
Judge Elsa Alcala
Judge Bert Richardson
Judge Kevin Yeary
Judge David Newell
Judge Mary Lou Keel
Judge Scott Walker

Texas Court of Criminal Appeals
P.O. Box 12308
Austin, Texas 78711

Re: ***The State of Texas, Petitioner v. Jose Oliva, Respondent,***
No. PD-0398-17 in the Texas Court of Criminal Appeals

To the Honorable Court of Criminal Appeals:

During yesterday's oral argument, Judge Alcala asked about the phrase "if it is shown on the trial of the offense." This language is found in multiple statutes including Section 49.09(a) of the Texas Penal Code which is relevant in this case. In pertinent part, this statute reads as follows:

- (a) . . . [A]n offense under Section 49.04 [DWI] . . . is a Class A misdemeanor with a minimum term of confinement of 30 days, if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated

Judge Alcala remarked that a trial consists of both a guilt/innocence phase and a punishment phase. Accordingly, she contemplated, the phrase in question would seem to allow elements of an offense to be proved during punishment as well as during guilt/innocence.

In response, I referenced the case of *Barfield v. State*, 63 S.W.3d 446 (Tex. Crim. App. 2001) in which this Court said:

In a genuinely bifurcated trial before a jury on a plea of not guilty, evidence that is introduced at the punishment phase can have little, if any, effect on the force of the evidence on the issue of guilt. In such a case, therefore, our consideration of the evidence is necessarily limited to that evidence before the jury at the time it rendered its verdict of guilt. *Id.* at 450.

Thus, in *Barfield*, this Court at least suggested that elements of an offense must be presented during the guilt/innocence phase of trial.

I also mentioned this Court's opinion in *Calton v. State*, 176 S.W.3d 231 (Tex. Crim. App. 2005) (authored by Judge Keasler). In *Calton*, this Court said that "to sustain a conviction, all elements of the offense must be proved at guilt." *Id.* at 234 (using the word "guilt" as a shorthand description of the guilt/innocence phase of a trial).

So this Court's own opinions have declared that all of the elements of an offense must be proved at the guilt/innocence phase of a jury trial. But Judge Yeary asked about the basis for this Court's declarations - were they based on a statute or on the state or federal constitution? At the time, I was unable to provide a complete answer to the Court. I think the following provides some guidance for the Court. This Court's declarations in *Barfield* and *Calton* were apparently based on Article 37.07, Section 2 and Article 38.03 of the Code of Criminal Procedure.

Article 37.07, Section 2 directs the judge to submit the issue of guilt or innocence to the jury before authorizing the jury to consider punishment.

Sec. 2. (a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the

jury to pass upon the punishment to be imposed. If the jury fails to agree on the issue of guilt or innocence, the judge shall declare a mistrial and discharge the jury, and jeopardy does not attach in the case.

Tex. Crim. Proc. Code Ann. § 37.07 (West)

Only if the jury returns a finding of guilt is the question of punishment to be considered. And Article 38.03 says that “no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.” These two statutes, taken together, are the basis for this Court’s declarations that all elements of an offense must be proved at the guilt/innocence phase.

Thank you for considering these post-submission comments.

Sincerely,

/s/ Ted Wood

Ted Wood

Assistant Public Defender

Harris County

Appellate Counsel for Jose Oliva

cc: Patricia McLean, Harris County District Attorney’s Office, via email